

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Mailed:  
July 22, 2003

Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Food Processing Equipment Co.

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Serial No. 75/909,661  
Serial No. 75/909,662  
Serial No. 75/909,664  
Serial No. 75/909,666  
Serial No. 75/909,667  
Serial No. 75/909,668  
Serial No. 75/917,250

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Request for Reconsideration

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Before Cissel, Seeherman and Bottorff, Administrative  
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant has requested reconsideration of our May 7,  
2003 decision affirming the Trademark Examining Attorney's  
final Section 2(d) refusals of registration in the seven  
above-captioned applications. We have carefully considered  
applicant's arguments, but we are not persuaded that we

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committed any error in our findings or in our decision. Accordingly, we deny the request for reconsideration.

Specifically, we stand by our finding that applicant's and registrant's respective goods, and the trade channels and classes of purchasers therefor, are similar. That finding was properly based on the evidence of record showing that the goods identified in applicant's applications and registrant's registration are types of goods which can be and are marketed by a single source to the same classes of purchasers. That applicant and registrant themselves might not currently market their respective goods to the same specific purchasers is not dispositive. Our determination is based, and must be based, on the goods as identified in the application and in the registration, not on what applicant's and registrant's specific actual marketing practices currently might be. See, e.g., *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987), and cases cited therein.

In its request for reconsideration, applicant also contends that we accorded improper weight to counsel's statements, made during a colloquy at the oral hearing, to the effect that Tyson's Foods might be a purchaser of both applicant's and registrant's types of goods. We disagree.

Our findings regarding the similarity of the goods, trade channels and classes of purchasers are based on the evidence in the record showing third-party use and registration of similar marks for both types of goods, not on counsel's statements at the oral hearing. Counsel's statements at the oral hearing are not evidence; we regard them as merely corroborative of our findings regarding the relatedness of the goods. In these circumstances, we see no error in our mention of counsel's statements in our opinion.

Applicant next argues that we erred when we found that there is no evidence in the record regarding the cost of the goods or the sophistication of the purchasers. Applicant contends that because counsel's argument on these points at the oral hearing was not disputed by the Trademark Examining Attorney, we should deem counsel's statements regarding the cost of the goods and the sophistication of purchasers to be "thus established by the record below." We are not persuaded. Counsel's assertions and arguments at the oral hearing are not evidence. See Trademark Rule 2.142(d).

Further with respect to the issue of the sophistication of purchasers, when we stated in our opinion that "we cannot conclude on this record that purchasers

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would be immune to source confusion resulting from the relatedness of the respective goods and the strong similarity of the marks," we were not suggesting that "immunity to source confusion," instead of likelihood of confusion, is the test under Section 2(d). Rather, we meant only that there is no basis in the record for concluding that purchasers who otherwise are likely to be confused due to the relatedness of the goods and the strong similarity of the marks would be immunized or protected from such likely confusion by virtue of their sophistication. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

In summary, we see no error in our decision. As noted in our previous opinion, to the extent that any doubts exist as to the registrability of applicant's marks, such doubts must be resolved against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision on reconsideration: Applicant's request for reconsideration is denied. Our decision affirming the refusals to register stands.